

Admin.

February 4, 2019

First Supplement to Memorandum 2019-2

Open Government Laws

Two issues have recently come up about the Commission's¹ public record transparency practices. They are discussed below.

ONLINE COLLABORATION

In 2017, the California Supreme Court decided *City of San Jose v. Superior Court*, 2 Cal. 5th 608 (2017), holding that "when a city employee uses a personal account to communicate about the conduct of public business, the writings may be subject to disclosure under the California Public Records Act."²

In response to that decision, the Commission decided to voluntarily limit its own use of personal communication accounts for Commission business. Thus:

(a) Commissioners and members of the staff shall not use text messaging or social media to send or receive a message that relates to the conduct of the Commission's business.

(b) Members of the staff should only use an official account to send or receive email messages that relate to the conduct of the Commission's business. In the event that a staff member uses a personal account for such a purpose, the staff member shall forward a copy of the message to an official account.

(c) If a Commissioner uses a personal account to send or receive an email message that relates to the conduct of the Commission's business, the Commissioner shall store the message in a location that is used exclusively for that purpose. When a Commissioner's term of service ends, the Commissioner shall forward all such messages to the Executive Director for retention.

(d) For the purposes of this section, "official account" means an email account within the domain "clrc.ca.gov." "Personal account" means any email account that is not an official account.

1. Any California Law Revision Commission document referred to in this memorandum can be obtained from the Commission. Recent materials can be downloaded from the Commission's website (www.clrc.ca.gov). Other materials can be obtained by contacting the Commission's staff, through the website or otherwise.

The Commission welcomes written comments at any time during its study process. Any comments received will be a part of the public record and may be considered at a public meeting. However, comments that are received less than five business days prior to a Commission meeting may be presented without staff analysis.

2. *City of San Jose*, 2 Cal. 5th at 614.

(e) The Commission's annual memorandum discussing "Open Government Laws" shall reiterate these practices.³

The adoption of that policy was not required as a matter of law. It was instead a practical decision, aimed at limiting future complications if there is a request for Commissioner communications.

Subdivision (a) provides that Commissioners will not use text messaging or social media to conduct Commission business. The staff recently discovered an apparent gap in that policy. Suppose that a Commissioner decides to use an online collaboration tool, like Google Docs, to develop a draft of a Commission-related document. To the extent that more than one person provides input on the document, it could constitute communication (especially if multiple drafts of the document include "comments" back and forth between the collaborators).

Such communications could be subject to disclosure under the California Public Records Act⁴. Locating and producing such communications could involve the kinds of practical difficulties that the Commission sought to avoid by adopting the policy set out above.

The staff is not sure that the existing use of the term "social media" in subdivision (a) would encompass online collaboration services. If the Commission believes that such services should be included in its policy, subdivision (a) could be revised along the following lines:

(a) Except as provided in subdivision (c), Commissioners and members of the staff shall not use text messaging or social media an electronic communication service to send or receive a message writing that relates to the conduct of the Commission's business. For the purposes of this subdivision, "electronic communication service" means any service that can be used to publish, send, or receive a writing electronically, including, but not limited to, text messaging, social media, and cloud-based collaboration.

There are two points worth noting about the proposed language. First, it has been generalized. It is often problematic to try to define electronic communication services simply by listing them. Technology changes too quickly and lists soon become outdated. So, rather than simply adding online collaboration services to the list in subdivision (a), the staff has attempted to craft a general term that would encompass all forms of electronic communication.

3. See Minutes (Aug. 2017), p. 4; Minutes (Sept. 2017), p. 3

4. Although potentially subject to disclosure, such communications might fall within the scope of the exception for preliminary drafts and notes, not retained in the ordinary course of business. See Gov't Code § 6254(a).

Because the new term would include email, the provision begins by creating an exception to the prohibition for the use of email pursuant to subdivision (c).

Second, the staff would replace the term “message” with “writing.” The latter is a term of art in the CPRA:

“Writing” means any handwriting, typewriting, printing, photostating, photographing, photocopying, transmitting by electronic mail or facsimile, and every other means of recording upon any tangible thing any form of communication or representation, including letters, words, pictures, sounds, or symbols, or combinations thereof, and any record thereby created, regardless of the manner in which the record has been stored.⁵

It makes sense to use the established term, to match the scope of potential disclosure under the CPRA.

The Commission should decide whether to address the issue discussed above and, if so, how.

AUDIO RECORDINGS ON WEBSITE

The staff has heard, indirectly and informally, that there is some interest in the Legislature in having the Commission live-stream audio of its meetings.

In order to do so, the Commission would need to obtain whatever equipment and software would be required to record and broadcast the meetings. It would also be necessary to arrange for high-speed wireless access at every meeting site. There would also be staffing costs, including contracting with IT staff to set up whatever kind of website capabilities are required to provide a platform for live-streamed content. The staff has not investigated the cost of providing live-streaming of meetings, but it might well be beyond the Commission’s means. Our operating budget is quite small.

Considering that the Commission already makes audio recordings of its meetings available to the public after a meeting is completed, the only advantage to live-streaming would be to allow someone to listen to the meeting as it happens, rather than waiting a day or two for the recordings to be made available. Live-streaming would not create an opportunity for the public to *participate* in a meeting from a remote location. It would just avoid a minor delay in hearing what occurred. **The staff does not believe that the benefit of live-**

5. Gov’t Code § 6252(g).

streaming would justify the expense and administrative difficulties involved in researching, procuring, and maintaining a live-streaming service.

The staff has also heard that there is legislative interest in having the Commission routinely post audio recordings of its meetings to its website, rather than doing so only when a member of the public requests access to a recording. That would be feasible, with the caveat that storage limitations would require the recordings to rotate in and out of the website, with older files being removed as necessary.

The Commission should consider whether it wants to make any changes to its practices regarding public access to meeting recordings.

Respectfully submitted,

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